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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL OIL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–16a) is reported at CCH, 1965 Trade Cases ¶71,557.

JURISDICTION

This is a suit commenced by the United States pursuant to Section 15 of the Clayton Act, 38 Stat. 736, as amended, 62 Stat. 909, 15 U.S.C. 25, to restrain an acquisition in violation of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18. The judgment of the district court (App. B, *infra*, p. 17a) was entered on September 20, 1965. The United States filed a notice of appeal on Novem-

ber 19, 1965. The time for docketing the appeal was extended by the district court and then by Mr. Justice White to July 17, 1966 and thereafter by Mr. Justice Brennan to and including August 16, 1966. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *DuPont & Co.*, 353 U.S. 586.

QUESTIONS PRESENTED

The ultimate question presented is whether the acquisition of Malco Products, Inc., by Continental Oil Co. violated Section 7 of the Clayton Act. That question involves the following subsidiary questions:

(1) Whether New Mexico was a relevant market for the purpose of considering the effects of the acquisition upon competition.

(2) Whether the government proved the illegality of the acquisition by showing

(a) that it would increase concentration in the production of gasoline for sale in New Mexico by uniting the refiners ranking third and fifth in terms of sales and accounting for 12.61% and 11.76% of the New Mexico market;

(b) that it brought an important (19%) source of supply for independent and discount distributors (Malco) under the control of a major integrated oil company (Continental), thereby tending to restrict gasoline marketing by independents who constitute a significant competitive factor in the New Mexico market.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

In May 1959, Continental Oil Company ("Continental") acquired most of the assets and business of Malco Refineries, Inc. ("Malco") including Malco's sole petroleum refinery, located in Artesia, New Mexico (GX–49, pp. 1–2, 4–5, 8; GX–50).[1] On May 16, 1961, the United States filed a complaint alleging that the acquisition violated Section 7 of the Clayton Act as amended because its effect might be to lessen competition substantially or tend to create a monopoly in the sale of gasoline in New Mexico. The district court granted Continental's motion for summary judg-

[1] Continental acquired the Malco refinery under a twenty-year lease for a total rental of $7,450,000 with an option to purchase the refinery at the end of the term for $100,000. The parties have stipulated that this transaction constitutes an acquisition within the meaning of Section 7 of the Clayton Act (Pretrial Order of July 13, 1965, ¶18b).

ment in September 1963. On May 4, 1964, this Court summarily reversed and remanded the case for trial on the merits. *United States* v. *Continental Oil Co.*, 377 U.S. 161. After trial, the district court entered a judgment dismissing the government's complaint.

I. THE FACTS

A. THE MERGING COMPANIES

Continental is a major oil company—that is to say, it is a large, fully-integrated oil company—engaged in the business of gathering and refining crude oil and marketing gasoline under its "Conoco" brand in 35 States. Prior to the acquisition, Continental was the eighth largest producer of domestic crude oil, the twelfth largest oil company in terms of net assets (approximately $788 million) and sales (approximately $597 million) and the fourteenth largest domestic refiner. It maintained a network of 700 jobbers and distributors and 8,150 service stations located throughout the Rocky Mountains, the north-central, southwestern and southeastern States (3d Stip.).

Continental owned one refinery in New Mexico. That refinery, located at Artesia, had a capacity of 4,000 barrels of oil per day (1st Stip.). Continental supplied 11.76% of all gasoline sold in New Mexico and was the fifth largest firm in terms of New Mexico sales (GX 68a; 1st Stip. ¶¶ 1, 10, 11, and 12). (If sales to other refiners are excluded, Continental accounted for about 10% of all New Mexico sales and was the fourth largest seller there (GX 69; 1st Stip. ¶¶ 1, 10, 11, and 12)).[2]

[2] See note 5, *infra*.

Prior to the acquisition, Malco was an independent oil company—that is to say, it was a small, local, not fully integrated oil company—which owned one refinery (3d Stip., ¶¶ 10–11). That refinery had a capacity of 11,500 barrels per day and was located in Artesia adjacent to Continental's New Mexico refinery. Gasoline from the Malco refinery was distributed by approximately 60 jobbers and distributors and 175 retailers in New Mexico, eastern Arizona, and El Paso County, Texas (1st Stip., ¶¶ 17–18). Malco's gasoline was sold at retail under the brands "Malco," "Nu-Mex" and "Valley" as well as on a rebranded basis,[3] at prices lower than those charged for major-branded gasoline such as "Conoco" (Tr. 915–916, 1263). Malco supplied 12.61% of all gasoline sold in New Mexico and was the third largest seller in New Mexico (GX 68a; 1st Stip., ¶¶ 1, 10, 11, 12).[4] (Excluding sales to other refiners, Malco accounted for 6.2% of all New Mexico sales and was the seventh largest seller there (GX 69, 1st Stip., ¶¶ 1, 10, 11, 12).)[5]

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[3] "Rebranded" gasoline is gasoline sold to independent distributors who sell it under their own brand names.

[4] While Malco controlled a considerably larger refining capacity than Continental, it used this capacity to produce asphalt and other fuels as well as gasoline (Tr. 821, 824, 826, 977–978).

[5] Some refiners, such as Malco, sold substantial amounts of gasoline to other refiners for distribution through the other refiners' marketing systems. Although we believe that market figures including such inter-refiner sales are appropriate to determine the concentration produced by this acquisition at the refinery level, we also urge (see *infra*, pp. 19–24) that the illegality of the acquisition is apparent even when such sales

B. CONCENTRATION IN THE NEW MEXICO MARKET

Each company that supplies more than 5% of the gasoline sold in New Mexico has refining facilities located either in New Mexico or on a pipeline serving New Mexico. Refineries not so advantageously located find it difficult to sell in New Mexico because the cost of transporting oil by truck is far greater than that of transporting it by pipe (Tr. 1575; cf. Tr. 795, 1492).[6] The New Mexico gasoline market is highly concentrated. The largest firm accounts for 17.09% of total gasoline sales, the four largest firms account for 54.89% of all sales and the eight largest firms (the smallest of which sells only 3.06% of the total) account for 86.69% of all sales (GX 68a).[7]

In terms of New Mexico sales, Continental's acquisition of Malco combined the third largest seller with 12.61% of the market (Malco) and the fifth largest

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are excluded. The volume of Malco's sales to other refiners does not, however, bear upon Malco's special importance as a supplier of independent marketers. (See pp. 8–11, 20–24, *infra*.) Inter-refiner sales should, therefore, be excluded in assessing the acquisition in terms of its effect on independent marketers.

[6] A few firms sell small amounts of gasoline in New Mexico despite the fact that they have no refineries located in the State or on a pipeline. Some of these firms ship oil by truck into portions of New Mexico close to their refineries. Cosden, for example, ships by truck to southeastern New Mexico, and such shipments account for about 3.06% of New Mexico sales. A few other firms buy gasoline from New Mexico or pipeline refiners and resell it through their own distribution system (GX 68a, GX 73a; CON X 81).

[7] If inter-refiner sales are excluded from total sales, the largest firm accounts for 17.15% of all gasoline sales, the four largest firms for 48.38%, and the eight largest for 76.30% of all sales (GX 69; GX 174). (See note 5, *supra*.)

seller with 11.76% of the market (Continental).[8] Continential thus became the largest seller, with 24.37% of the market. The total market share of the four largest firms increased from 54.89% to 66.65% (GX 68a).[9]

Refineries located in New Mexico or on New Mexico pipelines comprise a refining capacity considerably greater than that necessary to produce the oil and gasoline sold in New Mexico. Most of that capacity is used to produce oil for sale in other States. (CON X 81; Tr. 1670; 1672–1675). In terms of the refining capacity of refiners located in New Mexico or on pipelines to New Mexico, the merger united Malco, the sixth largest firm accounting for 5%, with Continental, the area's seventh largest firm accounting for 1.8% of all refining capacity. As a result of the acquisition, Continental controlled 6.8% of the area's total refining capacity and is the sixth largest firm in terms of refining capacity. The largest four firms account for 80.5% of such capacity and the largest eight firms account for 98.5%. One firm, Phillips, accounts for 31.1%

[8] If sales to other refiners are excluded, the acquisition combined Continental, the fourth largest seller with about 9.6% of the market, and Malco, the seventh largest seller with about 7% of the market, and established Continental as the second largest seller with approximately 16% of the market. The total market share of the four largest sellers increased from 48.38% to 54.58% (GX 69; GX 174).

[9] There are very minor discrepancies between the stipulated market-share figures (1st Stip., ¶ 1) and other market-share figures introduced by the government (see GX 68a). The latter have been used throughout this jurisdictional statement because they are more complete.

of such refining capacity. (CON X 81; Table 3, App. C, *infra*, p. 19a).

C. THE ECONOMIC SIGNIFICANCE OF THE INDEPENDENT REFINERS

Of the 378 million gallons of gasoline sold in New Mexico in 1958, 250 million were sold by major, integrated oil companies while 128 million, or 35%, were supplied by independent refiners (1st Stip., ¶ 1, p. 1; GX 68a). The government's expert witness, Dr. DeChazeau, testified that major oil companies tend to concentrate upon competition in terms of quality and service rather than price (Tr. 426–427, 469). Because each major believes that any price-cut would be followed by its competitors and would lead to a fall in total revenue, the majors seek to avoid price competition, and their retail prices tend to be rigid (Tr. 426–427). Moreover, because of their strong interest in price stability and because they wish to protect their brand names, major refiners ordinarily will not sell gasoline to independent distributors who supply retailers selling gasoline at discount under brand names not nationally advertised (Tr. 438–439).[10]

[10] Four major oil companies sold significant amounts of their own gasoline in New Mexico: Texaco, Continental, Phillips, and Standard of Texas (Sotex). The record makes clear that prior to the acquisition of Malco, Texaco, Continental and Phillips did not sell any substantial quantity of gasoline to independent marketers in New Mexico (1st Stip., ¶ 2a (Texaco), ¶ 12; Tr. 591 (Continental); GX 77a (Phillips)). The record is less complete as to Sotex, but it establishes at least a *prima facie* case that Sotex followed a policy similar to that of Phillips, and the record contains no evidence that Sotex sold significant amounts of gasoline to independent marketers (see GX 148a; Tr. 438, 1490–1491, 1546, 1550, 1610; but see Tr. 1149, 1328).

Independent refiners, on the other hand, tend to rely on price as their principal competitive weapon, for they cannot afford to pay for the advertising necessary to create a demand for their brand. Moreover, they generally sell at prices below those charged by the major-brand refiners. Dr. DeChazeau concluded that the "tendency towards non-price competition * * * has been held in check * * * by the existence of a fringe of independents who * * * [can] cut price[s] and, therefore, tend to hold price levels down" (Tr. 443).

Dr. DeChazeau's conclusions were disputed to a limited extent by Dr. Boatwright, an expert witness for Continental. Dr. Boatwright testified that he did not believe that any clear line divided oil companies into majors, spurning price competition, and independents, competing in price.[11] While the court

[11] Dr. Boatwright's testimony on this issue consists of his comment on Dr. DeChazeau's statement that majors are concerned with stabilizing prices. Dr. Boatwright's comment in its entirety is as follows (Tr. 1639–1640):

> Now, secondly, there is an inference in my interpretation of what you read that above some mythical line companies are interested in what is characterized as price competition, while above that line they are interested—may I start over again. There is a mythical line above which certain companies are interested in non-price competition and other companies below that line that are interested in price competition. I cannot accept that, for the very simple reason that I have known many companies just as eagerly interested in price competition that are quite large and I have known many companies that are not so large equally interested in the service and the quality aspect of competition, so as a generality I would have to say that I would discuss the question with Dr. DeChazeau.

did not specifically pass on this divergence of opinion, it seemed to accept Dr. DeChazeau's views, for the court's opinion states (App. A, *infra*, p. 13a), "the price of some gasoline may include service as well as quality. On the other hand, some stations cut the price and do not give service or quality. * * *. It was developed that there was a differential in the price of gasoline sold by major companies and independent companies * * *."

Prior to the merger, Continental, like other majors, refused to sell gasoline to rebranding retailers (Tr. 1453), preferring to sell under its own brand name (Tr. 1275–1276) or, if necessary, to other major brand firms. If a surplus appeared likely, Continental, like other major oil companies, commonly followed the practice of either adjusting its output or exchanging gasoline with other majors, rather than allowing its gasoline to be sold under independent brand names (Tr. 438, 614–615).

Malco, on the other hand, represented something of a prototype of an independent refiner, for it concentrated on the sale of its product without reference to brands (Tr. 428). Malco's jobbers and distributors were allowed to sell to anyone they pleased and were free to determine their resale prices (Tr. 881). Prior to the merger, Malco was the third largest independent refiner serving New Mexico and supplied 19.3% of the gasoline sold by independent jobbers, distributors and retailers in New Mexico (GX 69). El Paso Natural Gas Products Co., which has since been acquired by a major, Shell (Tr. 266, 433,

948, 1785), supplied another 27.6%, and Shamrock Oil & Gas Co. supplied 19.5% of all independent gasoline. The remaining eleven independent refiners furnished only one-third of the independent gasoline sold in New Mexico (GX 69).

II. THE PROCEEDINGS BELOW

After this Court's reversal in 1964 of a summary judgment for defendants (377 U.S. 161), a trial on the merits was set for July 1965. Just prior to trial, Continental sold all of Malco's distribution facilities—but not Malco's refinery—to an independent corporation (Tr. 7–8). Continental agreed to supply that corporation with gasoline for a period of 10 years (Tr. 10–12).

At the trial the government contended that New Mexico was an appropriate market in which to consider the effects of the acquisition. The government claimed that the acquisition would probably lessen competition substantially in New Mexico because it would significantly increase concentration there (Tr. 1935) and was likely to eliminate a significant source of supply to independent marketers—marketers who constituted a particularly important competitive factor and who relied upon the Malco refinery for nearly one-fifth of their gasoline (Tr. 2007–2008).

Following the trial the district court dismissed the government's complaint. The court found (App. A, *infra,* p. 5a) that the relevant market was not New Mexico but, rather, a tri-state area consisting of New Mexico, eastern Arizona and El Paso County, Texas.

The court included El Paso County and eastern Arizona in the market because Malco sold in these areas as well as in New Mexico. Further, the court found (App. A, *infra*, p. 8a) that Malco accounted for only 4% and Continental for only 2.2% of sales in this tri-state market area. The court concluded (App. A, *infra*, p. 14a) that the percentage share of the market of Continental before and after the acquisition "was not sufficient to bring it within the presumption of being anti-competitive as set forth in *United States* v. *Aluminum Company of America*, 377 U.S. 271; *United States* v. *Continental Can Co.*, 378 U.S. 441 or *United States* v. *Philadelphia National Bank*, 374 U.S. 321." In view of these conclusions, the court held (*ibid.*) that the government did not prove "any substantial lessening of competition in the past nor any reasonable probability of lessening competition in the future."

THE QUESTIONS ARE SUBSTANTIAL

The district court's conclusion that the acquisition did not have the anticompetitive effects proscribed by Section 7 was predicated, in the first instance, on the court's determination that the State of New Mexico was not an appropriate market area in which to measure those effects. Under this Court's recent decision in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, however, that ruling was plainly erroneous. The district court apparently believed that since Malco sold in Arizona and west Texas as well as New Mexico, the tri-state area made up the only

relevant market. But the government is not required to show that competition will be lessened in *every* place that the two merging firms compete in order to show that a merger may lessen competition substantially. Rather, a merger is illegal if it may lessen competition substantially in *any* significant geographical area in which the merging firms compete. As this Court stated in *Pabst* (384 U.S. at 549), "[t]he Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of Section 7 would be proved."

Thus in *Pabst* the Court held that evidence as to the probable effect of the merger upon competition in Wisconsin was sufficient to show a violation of Section 7 despite the fact that Pabst and Blatz, the merging companies, also competed in many areas other than Wisconsin. In the present case, it is true that Continental and Malco competed not only in New Mexico but also in eastern Arizona and western Texas. Nonetheless, if the government shows that the acquisition of Malco by Continental may lessen competition substantially in New Mexico alone, it has shown a violation of Section 7, for if competition may be lessened significantly in New Mexico, New Mexico would constitute a relevant "section of the country" for purposes of Section 7.

Furthermore, it is clear that refiners, other than those located in New Mexico or on New Mexico pipe-

lines (whose sales we include in describing the New Mexico market), do not provide a fully comparable alternative source of supply for purchasers located in New Mexico. The record shows that in 1958 seven refiners each supplied more than 5% of the gasoline sold in New Mexico.[12] Each of those seven was located either in New Mexico or on a New Mexico pipeline. Other firms are hindered from selling in New Mexico by significant barriers. As has been pointed out (see p. 6, *supra*), transport by truck into New Mexico is far more expensive than transport by pipeline. Thus refiners located in New Mexico or on New Mexico pipelines have a significant cost advantage over refiners not so located (Tr. 795, 888, 1492, 1575). Moreover, as to those firms which might but do not now truck gasoline to New Mexico, the barrier of transportation costs must be aggregated with the costs of developing distribution facilities and evoking consumer acceptance which any new entrant would have to face (Tr. 454–457). Since the merging firms competed in New Mexico, and since cost barriers prevent firms not now selling in New Mexico from providing a comparable source of supply for the purchasers located there, New Mexico constitutes an appropriate market area for determining the anticompetitive effects of the acquisition.

Once New Mexico is recognized as an appropriate section of the country in which to test the consequences of the acquisition, it becomes apparent that the acquisition had the proscribed anticompetitive

[12] See Table 1 (App. C, *infra*, p. 18a). (See CON X 81.)

effects for two reasons. *First,* in light of the Court's decision in *United States* v. *Von's Grocery Co.,* 384 U.S. 270, it is clear that, in the New Mexico market, the increased concentration among suppliers of gasoline effected by the acquisition more than suffices to bring it within the prohibition of Section 7. *Second,* the acquisition is illegal because it removes from the market an important independent source of gasoline for independent channels of distribution and thus entails the elimination of a substantial factor in competition.

1. The framers of the antimerger act expressed particular concern with what economists call "oligopoly," the condition in which most of the business of a market is controlled by a few firms. Theory and experience teach that when a market becomes highly concentrated or oligopolistic in structure, the intensity and effectiveness of competition—and price competition in particular—are likely to diminish. Each of the major sellers bulks so large in the market that a price cut by one cannot be ignored by the others, but must immediately be matched. Price cutting therefore does not pay, and tends to be avoided; "parallel policies of mutual advantage, not competition * * * emerge." *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 280.

In order to carry out the purposes of the antimerger act and to protect competition by preventing economic concentration, this Court, in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, and *United*

States v. *Von's Grocery Co.*, 384 U.S. 270, made clear that a merger is presumptively illegal when it (1) produces a firm that has "an undue percentage share" of the relevant market and (2) results in "a significant increase in the concentration of firms in that market" (374 U.S. at 363). The acquisition involved in the *Philadelphia National Bank* case produced a firm controlling 30% of the relevant market. The acquisition in the *Von's Grocery* case produced a firm whose sales accounted for 7½% of the Los Angeles market for retail groceries. In the present case the increase in Continental's market share from 11.76% to 24.37% and the correlative increase in concentration among suppliers of gasoline to New Mexico invalidate the Continental-Malco merger under the tests of *Von's Grocery Co.* and *Philadelphia National Bank.*

When concentration among New Mexico suppliers is measured in terms of the market shares of those firms, it is clear that the merger increased concentration significantly.[13] Sales figures for firms selling in New Mexico are provided in Tables 1 and 2 (App.

[13] The potential injury to consumers from increased concentration at the refining level is not affected by the fact that some refiners are integrated (like Continental) and others sell to independent distributors (like Malco). The fact that Malco and Continental sell through quite different channels of distribution is irrelevant from the point of view of the ultimate retail consumers. The ultimate buyers are free to choose between gasoline refined by Continental and that refined by Malco. As the district court held, "all prices and quality of gasoline is in competition with all other gasoline" (App. A, *infra*, p. 13a).

C, *infra,* p. 18a). In terms of sales, this acquisition united the third and fifth largest firms, made Continental the largest seller with 24.37% of the market, and increased concentration among the first four firms from 54.89% to 66.65%.[14]

It may be argued that concentration figures based on sales overstate the importance of Continental and Malco in the New Mexico market in view of the fact that some of the other firms selling in New Mexico have large refining capacities located on New Mexico pipelines so that those firms could increase their New Mexico sales by diverting gasoline from other markets.[15] However, both the government's expert and defendant's expert believed that it would be misleading to count capacity used to produce gasoline sold in other markets as capacity available to serve New Mexico (Tr. 466–467, 1676), because as the record makes clear, most of the capacity not now being used to produce gasoline for sale in New Mexico is being used to produce gasoline for sale in other markets

[14] Measured in terms of sales excluding inter-refinery sales, the acquisition united the fourth and seventh firms, raised Continental's position from fourth with 9.66% of the market to second with about 16% and increased concentration among the first four firms from 47.73% to 54.58%.

[15] A ranking of firms in terms of refining capacity available to supply the New Mexico market would place Malco sixth, with 5% of all capacity and Continental seventh, with 1.8% of capacity (see Table 3, App. C, *infra*, p. 19a). The merger had the effect of raising Continental from seventh to sixth place and increasing its refining capacity from 1.8% to 6.8%. It increased total concentration of refining capacity among the first six firms from 95.6% to 97.4%.

(see Tr. 466–467, 1676).[16] Insofar as refining capacity is used to produce gasoline committed to other markets, measurement of concentration in terms of refining capacity would overstate the amount of gasoline free to enter the New Mexico market. Moreover, all of the refining capacity in New Mexico or on New Mexico pipelines is owned by firms already selling significant amounts of gasoline in New Mexico. Those firms may have little, if any, incentive to introduce more oil into New Mexico if an oligopolistically induced price increase takes place, for such a price increase, though entailing a restriction of sales, will benefit each of them.[17]

Finally, even if sales-percentage figures (as compared with capacity-percentage figures) may be thought to overstate the competitive significance of

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[16] Less than 20% of total capacity is unused (CON X 161). Exactly how much gasoline might be shifted to New Mexico as the result of such a price increase is impossible to say without more complete knowledge of possible future supply and demand conditions not only in New Mexico but also in each of the other markets where this gasoline is sold.

[17] A different situation might be presented if capacity, located on New Mexico pipelines, to produce oil not now being sold in New Mexico were owned by firms not now doing any business in New Mexico. In that case an increase in price in New Mexico might well draw oil from such companies into the market, for they could only benefit by selling more oil there. In such a case capacity figures might be of greater help in assessing the competitive significance of an acquisition, for they might give some indication of the supply of gasoline that could be drawn into New Mexico if prices there increased. Even in that case, however, capacity figures would not be relevant if new brands encountered significant entry barriers. Cf. pp. 13–14, *supra*.

Continental and Malco because they do not take into account additional oil-refining capacity located on the New Mexico pipelines, those figures also understate the competitive significance of Malco because they do not take into account its position as a supplier to independent oil distributors. As has been pointed out (see pp. 8–11, *supra*), independent marketers play a role in achieving price competition in the gasoline market out of proportion to their size. Because it is impossible to say with confidence whether the sales-percentage figures should be shaded somewhat upward or somewhat downward and because, for the reasons pointed out above, any downward shading is likely to be small, sales percentage figures roughly reflect the likely effect of this acquisition upon competition. Under the tests of *Philadelphia National Bank* and *Von's Grocery,* the increase in concentration that these figures reveal is sufficient to make the acquisition illegal.

2. The House Report on the Celler-Kefauver Amendment to the Clayton Act states that one type of acquisition that Congress intended to make illegal under Section 7 of the Clayton Act is an acquisition that eliminates "in whole or in material part * * * the competitive activity of an enterprise which has been a substantial factor in competition." [18] This type of acquisition is unlawful because the removal of such an enterprise will normally lessen competition substantially. Assuming *arguendo* that the present acquisition did not raise concentration figures in the

[18] H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

New Mexico market so as to make the acquisition illegal under the Court's decisions in *Von's Grocery Co.* and *Pabst Brewing Co.*, the acquisition is nevertheless illegal under Section 7 because it removes Malco—"a substantial factor in competition"—from the New Mexico market.[19]

As has been pointed out, Malco's role in creating competition in the sale of gasoline in New Mexico is far greater than a percentage figure based on total sales or on total refining capacity can reveal, for Malco is an important supplier of gasoline to independent jobbers and distributors. The record indicates that the major oil companies compete in terms of advertising and services rather than price. Independents, on the other hand, concentrate on price competition. The presence of independents in a market is an important factor in keeping gasoline prices low, for their presence limits the power of the majors to set higher than competitive prices. See pp. 8–11, *supra*.

The elimination of Malco as an independent refiner is likely to restrict the supply of gasoline available to independent distributors in New Mexico. In 1958 six firms sold significant amounts of gasoline to independent distributors in New Mexico. Of those six, three (El Paso, Shamrock, and Malco) accounted for close to 70% of all such prices. El Paso accounted for 27.6%, Shamrock for about 19.5% and Malco for 19.3% (see Table 4, App. C, *infra*, p. 19a). More-

[19] Since Malco was acquired by one of its competitors, we need not here consider when, if ever, a firm outside a market may be forbidden to acquire the assets of a particularly competitive firm within a market and remove them from that market.

over, prior to the acquisition, only six independent refineries were able economically to supply significant amounts of gasoline to New Mexico.[20] Of those six companies, three accounted for 91.0% of the total independent refining capacity. Shamrock accounted for 38.2%, El Paso for 35.2%, and Malco for 17.6% (see Table 5, App. C, *infra*, p. 19a). Thus, by acquiring Malco and eliminating it as an independent supplier of gasoline to independent distributors, Continental has elminated an independent source accounting for nearly 20% of all sales to independent distributors and more than 17% of the independent capacity that might economically be used to supply independent distributors.[21]

The elimination of Malco becomes all the more serious in view of the fact that El Paso, an independent refiner even larger than Malco, has recently been acquired by Shell, a major oil company (Tr. 433).

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[20] Only five independent firms selling significant amounts of gasoline in New Mexico owned refineries located in New Mexico or on New Mexico pipelines. A sixth independent firm, Cosden, shipped gasoline to New Mexico by truck. Cf. n. 6, *supra*.

[21] For reasons pointed out at pp. 18–19, *supra*, it is highly unlikely that all or even significant portions of the independent refining capacity now being used to produce gasoline for markets other than New Mexico could or would be used to supply the New Mexico market. Moreover, while some independent refiners not in New Mexico or on a New Mexico pipeline, such as Cosden, currently supply parts of New Mexico by truck, because of high truck-transport costs it is unlikely that they could substantially increase that supply.

The cumulative effect of these two mergers is to reduce from six to four the number of independent refiners selling more than insubstantial amounts of gasoline in New Mexico, and to eliminate 52.8% of the independent refining capacity that had been available in 1958. Table 5, App. C, *infra*, p. 19a. Unless the majors significantly increase their sales to independent distributors—and the record indicates that this is improbable (see *supra*, p. 10; *infra*, p. 23)—Continental's acquisition of Malco is likely either to make it more difficult for independent refiners to buy all the gasoline they require, or to increase significantly the price they have to pay for it. Indeed, the record shows that, both before and after the acquisition, some independent distributors experienced difficulty in obtaining adequate supplies of gasoline (Tr. 1117–1118, 1120, 1878).[22] Thus, elim-

[22] The district court found that sufficient gasoline was being imported into New Mexico to supply any company wishing to buy (App. A, *infra*, p. 13a). The court did not find, however, that majors would sell to independents. And, imports by major companies will not help independent distributors so long as majors are unwilling to sell to them. The court may have been referring to the fact that there is sufficient independent refining capacity along New Mexico pipelines to supply independent distributors in New Mexico. If so, the court's finding that this capacity exists does not support its conclusion that the elimination of Malco as an independent supplier will not injure competition. Normally, a significant reduction in the amount of gasoline available to independent distributors in New Mexico would lead to a significant increase in the price charged such distributors for the oil supplied them. While there may be sufficient capacity to supply all that is desired at an increased price, the price increase itself will make it considerably more difficult for the independents to compete successfully with the majors.

ination of Malco as an independent refiner will have an effect upon competition out of proportion to that indicated by the amount of Malco's sales in New Mexico, and Malco's removal amounts to the elimination of a "substantial factor in competition."

Of course, the elimination of Malco as an independent source of supply would not be serious if the major oil companies were willing to supply large amounts of gasoline to independent distributors. The record indicates, however, that major oil companies have not supplied independent distributors in New Mexico with significant amounts of gasoline in the past. (See note 10, *supra*). Indeed, it suggests that they are strongly motivated not to supply independents, for independent marketers tend to disrupt price stability by introducing price competition into the market (see Tr. 432–434). And there is some indication that, despite the pendency of the present suit, Continental since acquiring Malco has discouraged it from supplying some independent marketers.[23] There is no indication in the record that other major oil companies will change their policies and begin to sell significant quantities of gasoline to price-cutting independent distributors.

It is true that Continental has created an independent distributing organization to service inde-

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And, insofar as the independent distributors must charge higher prices, the gasoline becomes more expensive for the consumer. In all events, the ability of the independents to inhibit price increases by the majors is materially reduced.

[23] The record reveals one instance of such pressure (Tr. 1277). The government offered to show numerous other such incidents, but the trial court refused to allow the government to do so (Tr. 1106, 1506–1508, 1858).

pendent distributors formerly supplied by Malco. (App. A, *infra*, pp. 12a, 14a). And it has agreed to supply that organization with a limited amount of gasoline for a limited period of time (Tr. 10–12; CON X 154). Presumably under this agreement, made just before the trial began, Continental must supply gasoline whether or not the new company sells to price-cutting independent marketers. Contrary to the district court's belief, however, Continental's supply agreement is not an adequate substitute for Malco's presence as an independent refiner. First, Continental is obliged to supply gasoline to the independent company for a ten-year period only; there is no assurance that, at the end of that time, Continental's historic reluctance to supply independents will not reassert itself. Second, during the life of the supply agreement Continental is obliged to supply the independent company in any year with only 3% more than the company bought from Continental in the prior year (CON X 154, p. 2). Thus, if demand falls in one year, the marketing company may be seriously restricted in the amount it can buy from Continental in succeeding years. Moreover, the marketing company is in some measure restrained from shifting purchases from Continental temporarily, lest its assured source of supply be reduced *pro tanto* for future years.[24]

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[24] The district court found (App. A, *infra*, p. 12a), that "if Malco buys its gasoline elsewhere it may diminish or lose the right to purchase from Continental in the succeeding year." The court also found (App. A, *infra*, p. 13a), however, that that circumstance "does not take away the independence of Malco in any degree."

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1966.

APPENDIX A

In the District Court of the United States, for the District of New Mexico

No. 4763 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CONTINENTAL OIL COMPANY, DEFENDANT

H. Vearle Payne, Judge

Decision and Opinion

In this Decision and Opinion the defendant, Continental Oil Company, will be referred to as "Continental." Malco Products, Inc., a New Mexico corporation, will be referred to as "Malco." The companies which preceded Malco will be called by their names, so that a distinction can be made between them. For clarity, the Court hastens to explain that the present company, named Malco Products, Inc., is a New Mexico corporation. It was preceded by Malco Products, Inc., a Delaware corporation. Hondo Oil and Gas Company was previously a party to this case, and it was preceded by Malco Refineries, Inc.

So that this Opinion will be better understood, it is necessary to give just a little history of the refinery, which is the subject matter of this suit. Prior to May 1, 1959, it was owned and operated by Malco Refineries, Inc., in the manner which will hereinafter be set forth. On said date Malco Refineries, Inc. leased to Continental, for a period of 20 years, its re-

finery at Artesia, New Mexico, with an option to Continental to purchase the refinery at the end of 20 years for $100,000.00. On or about August 1, 1959, Malco Refineries, Inc. conveyed its assets, including its interest in the lease purchase contract, to Hondo Oil and Gas Company, a New Mexico corporation. About that time, Malco Products, Inc., a Delaware corporation, was organized as a subsidiary of Continental, and it carried on the marketing operations of the refinery in question, until July 1, 1965, at which time it conveyed substantially all of its assets to Malco Products, Inc., a New Mexico corporation.

The old Malco Products, Inc., a Delaware corporation, has changed its name to Oclam, so that there will be no confusion between the new corporation and the old one.

The parties have stipulated that the transaction by which Continental acquired the refinery was an acquisition within the meaning of Section 7 of the Clayton Act, even though it was a long-term lease with an option to purchase. This transaction occurred on May 1, 1959, and it is this acquisition which is the subject matter of this action.

Suit was filed on May 16, 1961. Thereafter, the defendant filed a motion to add Hondo Oil and Gas Company as a party defendant. On September 18, 1961, the Court entered its order herein granting the motion to add Hondo Oil and Gas Company as a defendant and authorizing the plaintiff to file an amended complaint accordingly. On October 23, 1961, the plaintiff filed its amended complaint. Thereafter, an answer was filed by the defendants.

A stipulation was filed narrowing the issues by excluding crude oil as a line of commerce. This was filed on July 10, 1963. On the same date, there was a first stipulation of facts, a second stipulation of facts

and a third stipulation of facts filed in the case. On July 29, 1963, a fourth stipulation of facts was filed. Immediately thereafter, Continental Oil Company filed a motion for summary judgment. On September 27, 1963, the Court entered its order and judgment herein granting the motion of Continental Oil Company for summary judgment and the amended complaint was dismissed as to both defendants. On November 26, 1963, the United States gave notice of appeal to the Supreme Court of the United States from the order granting Continental's motion for summary judgment. It did not appeal from the order insofar as it dismissed the complaint against Hondo Oil and Gas Company. In due course of time the Supreme Court reversed the decision of the District Court and remanded the case for a trial on the merits, 377 U.S. 161. The Hondo Oil and Gas Company took the position that it was no longer a party to the case since no appeal had been taken by anyone from the order dismissing it from the case. This position was sustained by the trial court. Continental filed a motion to bring the Hondo Oil and Gas Company back into the case but the Court denied the motion and also entered an order striking the name of Hondo Oil and Gas Company from the style of the case. This case thereafter came on for trial on the merits and the Court heard all of the evidence in behalf of the plaintiff and in behalf of the defendant Continental.

LINE OF COMMERCE

The first problem in a case of this type is to determine the line of commerce that is involved. The parties hereto have stipulated that gasoline is the line of commerce and, therefore, there is nothing for the Court to decide in this matter. It is true that a great

deal of testimony was presented with regard to the different grades and prices of gasoline and the different manner of handling sales. There was testimony concerning the companies which sold gasoline under a brand name and those that did not, as well as testimony concerning the prices of gasoline even when sold under a brand name. However, the parties still agreed, and the Court concurs, that gasoline is the line of commerce. In passing, it might be well to comment that the evidence showed that all gasoline was in competition with other gasoline regardless of the price or quality.

RELEVANT MARKET

Section 7 of the Clayton Anti-Trust Act, insofar as it relates to the acquisition of the assets of one corporation by another, refers to a line of commerce "in any section of the country." In other words, the Court must determine what section of the country is involved and this is commonly referred to as the relevant market area. The plaintiff contends that New Mexico is the relevant market area and that Albuquerque is a sub-market. The Court finds that the entire State of New Mexico, El Paso County, Texas and the eastern half of Arizona, extending to and including all of Maricopa County, Arizona, is the relevant market area in this case. That includes, of course, Tucson, Nogales, Flagstaff and other places in eastern Arizona.

Although in the sale and distribution of gasoline it is necessary to consider both the market area and the source of supply, this Opinion will first be concerned with the relevant market area. The Supreme Court in *United States* v. *DuPont and Company*, 353 U.S. 586, at page 593, seems to define the relevant market area as the "area of effective competition."

In *Brown Shoe Company* v. *United States,* 370 U.S. 294, at page 333, it is stated that in determining the effect of an acquisition the Court must consider such effect on competition generally in an economically significant market. In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, at page 357, the Court said:

> The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive over-lap, the effect of the merger on competition will be direct and immediate.

It was necessary for the Court to examine the facts to determine the relevant market area in accordance with the law hereinbefore set forth. Both parties agreed that New Mexico was a relevant market area, but the plaintiff contends that it is the entire relevant market area and that Albuquerque is a sub-market. On the other hand, the defendant contends that New Mexico, Arizona and El Paso County, Texas, is the relevant market area. The Court has heretofore defined what it finds to be the relevant market area.

It does not appear to be necessary to discuss New Mexico as a part of the relevant market area since the parties do not dispute this fact. However, the Court will discuss its reasons for including the other areas.

From the evidence, including the maps, it does not appear that the acquired company served Western Arizona. The evidence disclosed that it did serve that portion of Arizona mentioned in the relevant market area, and the sole question remaining is whether or not the sales were substantial enough to amount to effective competition within the meaning of the law heretofore mentioned.

The evidence shows that in 1958, when the acquisition occurred, the company owning the Artesia Refinery was selling gasoline to various people who owned Malco stations in eastern Arizona. Among other things it was shown that there were 16 such stations in Tucson, 11 in Phoenix, and a number of other stations scattered over the eastern part of Arizona. In 1958 these sales amounted to 13,753,000 gallons in Arizona. The Court heard the various witnesses who operated some of the Arizona service stations or who distributed to other stations in that area. From the entire evidence in the case the Court finds that the portion of Arizona, heretofore described, was a part of the relevant market area and that the gasoline sold there both before and after the acquisition was substantial enough to bring that area within the relevant market area.

During the year 1958 Malco Refineries, Inc. sold 3,650,000 gallons of gasoline in El Paso County, Texas, exclusive of sales of gasoline to other refineries. However, of this amount they purchased 1,988,000 gallons from the Standard Oil Company for resale. That means that they sold in that area 1,862,000 gallons of gasoline not purchased from others and 1,988,000 gallons of gasoline purchased from Standard Oil Company. This was 3.12% of the total sales in El Paso County, Texas.

The Court does not remember whether or not there was testimony concerning service stations in El Paso which used the Malco gasoline in 1959. There is evidence that Malco Refineries sold gasoline from 1956 to 1959 to a Mr. Edmondson, or his family, in El Paso. This may have continued to 1960. Mr. Edmondson died in 1957 and a Mr. McNutt bought the business from his widow in 1960. It was at that time an active business and distributing products under

the Malco name. Mr. McNutt, at first, purchased his supplies from El Paso Natural Gas Company, but in 1961 he switched back to Malco. He had 18 stations in El Paso and 14 in New Mexico. It was not shown how many of these he acquired from Edmondson's widow but apparently there was a good deal of gasoline being distributed in El Paso which came from the refinery of Malco Refineries Company in 1959, when the acquisition occurred, and there has been a good deal sold ever since that time in that area. From that the Court finds that El Paso County, Texas, is one part of the relevant market area. In fact, there is now a pipe line from the refinery at Artesia, New Mexico, to El Paso, and it connects with the line going to Tucson and Phoenix, Arizona. And there is another line connecting El Paso with Albuquerque, New Mexico. This area cannot be ignored in determining the questions before the Court.

The parties have stipulated that the total sales of gasoline by Malco Refineries, Inc., in New Mexico, after excluding sales to other refineries, for 1958 was 23,427,000 gallons or 6.2% of the total sales for the state, and that the total sales of Conoco for the same year, after excluding sales to other refineries, was 36,404,000 or 9.63%. This is a total of 15.83% of sales in New Mexico. It was further stipulated that the sales by Conoco, together with Malco Products, Inc., a Delaware Corporation, in New Mexico, excluding sales to other refineries, for 1961 (after the acquisition) was 59,976,000 gallons or 14.68%, showing that Continental and its subsidiary, after the acquisition, sold less than the two companies did before.

The Court finds, however, that Malco Products, Inc., a Delaware Corporation, was operated by Conoco exactly as it or its predecessor had been operated before the acquisition. It was an active competitor on

the market and operated just as it did before so that it did not diminish competition in the least.

The Court further finds that the production of Malco Refinery, Inc., for 1958, was 6.4% of the consumption in the relevant market area and the production of Conoco for that year was 3.2% of the consumption in the relevant market area, for a total of both companies of 9.6%. For 1961 the total of Conoco, with its said subsidiary, was 7.2% of the consumption for the relevant market area. This included the sales to other refineries.

When sales to such other refineries are excluded the production of Malco Refinery, Inc., was 4% and Conoco was 2.2% for a total of 6.2% in the relevant market area. By 1961 (after the acquisition) the production of Conoco, with the subsidiary, was 3.6% in the relevant market area.

The parties stipulated to facts which show the number of and the capacity of the refineries in New Mexico. The contention was advanced by the United States that the production of the refineries of Malco and Continental, when combined by the acquisition, would be large enough to reasonably tend to lessen competition in New Mexico. The Court has found that New Mexico, alone, is not the relevant market area. The Court further feels that the production of the two refineries in question, even if combined, is not the ultimate test in determining whether or not competition is lessened. For instance, Arizona, a part of which is the relevant area, has no refinery at all. In other words, the Court has to look to the relevant supply area as well as the relevant market area in determining the effects, if any, on competition of the acquisition. That applies to New Mexico and El Paso County, Texas, as well as Arizona. The Court cannot look to the production alone in New Mexico and shut

its eyes to the importation of gasoline from other areas in determining the effect of the acquisition. Neither can the Court fail to consider sales of gasoline by Malco and Continental to other refineries in determining the effect of the acquisition on the consuming public.

In presenting the facts to the Court the parties considered Arizona as a whole and did not attempt to separate the figures so as to show them as they relate to the relevant market area mentioned by the Court. For that reason the findings of the Court will have to refer to the entire State of Arizona, even though the Court has not considered the entire state to be in the relevant market area. However, the large metropolitan areas of Phoenix and Tucson, and in fact the great portion of the population of Arizona is in the relevant market area, and for all practical purposes we may take the figures which have been presented.

From the foregoing facts it is clear that the concentration of supply in New Mexico cannot be gauged by merely considering the refineries in New Mexico, nor in the relevant market area. Southern California, with its mammoth gasoline supply, cannot be ignored as a source of gasoline for Arizona. Neither can west Texas be ignored as a source of supply for the entire relevant market area heretofore defined. In determining whether or not there has been that degree of concentration condemned by the Supreme Court this entire picture must be taken into account.

In addition the Court finds that there is a practice of exchanging gasoline between companies which affects enormous supplies of gasoline. For that reason the refineries in a certain area are not the sole and only consideration. Large companies in other areas exchange gasoline in order to conserve trans-

portation costs. These exchanges make it possible for companies which do not have a refinery in a designated area to exchange gasoline with refineries that do. This works to the advantage of both refineries and saves transportation for each. This cannot be ignored in determining the question of competition. As an example, a company which has a refinery in Texas, which does not have a refinery in southern California, may exchange gasoline with some company that does have a refinery in southern California. By this device the refinery in Texas could deliver gasoline in Albuquerque, in exchange for gasoline delivered at Phoenix by the refinery from southern California. The testimony indicated that this system is used widely in the industry. In other words, the source of supply is often enlarged to wide areas by the exchange of products. This enlarges the number of suppliers and minimizes or eliminates concentration or control by a few.

In order to determine the effect on competition it is necessary then to determine what the supply of gasoline may be for the relevant market area. This cannot be determined by the refineries in New Mexico alone but must be determined from a practical standpoint, considering any refineries which may, in the usual course of business, supply the area.

There is a refinery belonging to Shamrock near Dumas, Texas, with a capacity of 25,000 barrels per day; one at Borger, Texas, belonging to Phillips, with a capacity of 71,000 barrels per day, and one at Amarillo, Texas, belonging to Texaco, with a capacity of 19,000 barrels per day. These three refineries are connected to a pipe line which runs westerly into New Mexico, with terminals at Tucumcari and Albuquerque. There is also a pipe line connecting them with

Lubbock, Texas, which is close enough to service part of New Mexico.

Albuquerque is likewise connected to El Paso, Texas, with a pipe line. There are two refineries at El Paso, one with a capacity of 53,000 barrels per day and one with a capacity of 16,000 barrels per day.

El Paso is connected with a refinery at Odessa, which has a capacity of 13,000 barrels per day, and a pipe line to Artesia, New Mexico, where Conoco had a refinery with a capacity of 4,000 barrels per day and where the Malco refinery is situated, which is in controversy here, which had a capacity of 11,500 barrels per day.

El Paso is connected to Tucson and Phoenix by a pipe line known as Southern Pacific Pipe Lines. In turn, Phoenix and Tucson are also connected to a pipe line to southern California, where there are 8 refineries, some of them very large. Likewise, southern California also gets gasoline from the northwestern area.

There are also refineries in west Texas, which supply gasoline into parts of the relevant market area by truck, which are not connected to pipe lines. For instance, Cosden has a refinery at Big Spring, Texas, with a capacity of 30,000 barrels per day. There are also others.

There was no evidence to show that the existing pipe lines were running to capacity. The Court finds that if they were they could easily and cheaply enlarge their capacity to meet greater and further demands on the supply.

From all of the foregoing it is the opinion of the Court that the acquisition in controversy did not substantially diminish competition and that there is no reasonable expectation that it will do so in the future. A careful examination of the map designated as Con-

tinental Exhibit 81, with the attending testimony, convinces the Court that competition on the retail level and on the refinery level has not been substantially changed and that there is no reasonable expectation that it will be affected in the future.

The Court heard the witnesses testify concerning the purpose of the acquisition as well as concerning the manner in which the new refinery was used by Continental after the acquisition. From all of the testimony the Court finds that it was the purpose and intent of Continental to operate the property acquired in the same way it had been previously operated. In other words, Continental did not acquire the property for the purpose of strengthening its position in its standard branded gasolines, nor did it use the property acquired for that purpose. The property was used for a continuation of the practices and policies which had been theretofore followed by Malco Refineries Incorporated.

Furthermore, prior to trial, Continental transferred to a Mr. Copple and his sons the entire stock, ownership, possession and control of the distribution portion of the acquisition. There were no conditions nor ties of any kind so that the distribution portion of the business acquired is no longer under the control of Continental. In that connection, Continental has agreed to furnish the gasoline supply to Malco, now owned by the Copples, for a period of years. This agreement is such that it cannot be cancelled by Continental. Malco is left free to purchase gasoline anywhere it may desire. There is, however, a provision that Continental will furnish only the amount of gasoline purchased in each previous year plus 3%. In other words, if Malco buys its gasoline elsewhere it may diminish or lose the right to purchase from Continental in the succeeding year. This contingency

does not seem likely to the Court and it does not take away the independence of Malco in any degree. The amount of gasoline being imported into the relevant market area seems more than adequate to provide a source of supply for any company desiring to purchase.

The Court finds from the evidence that all prices and quality of gasoline is in competition with all other gasoline. None of the witnesses disagreed on this point. In other words, the major companies are in competition with the independent companies and vice versa. It was conceded that gasoline was the line of commerce. There was no issue then to determine whether or not there were various lines of commerce based on the price or quality of gasoline.

It was developed that competition is based on three elements, namely, price, quality and service. In other words, the price of some gasoline may include service as well as quality. On the other hand, some stations cut the price and do not give service or quality. Nevertheless all gasoline was found to be in competition with all other gasoline and the consuming public makes its choice after considering all phases of this competition.

It was developed that there was a differential in the price of gasoline sold by major companies and independent companies which was more or less constant. When one line of gasoline was sold at a lower price the other line followed so as to maintain this differential. This was not an unqualified rule but it applied in most instances.

The Court now wishes to make its conclusions on the facts heretofore set forth.

The line of commerce was agreed upon. This met the requirements set forth in *Brown Shoe Company, v. U.S.* 370 U.S. 294, at page 326. It was gasoline.

The Court has determined the relevant market area as required in *United States* v. *DuPont & Company,* 353 U.S. 586 at page 593. The Court has followed the definition of the relevant market area as defined in *United States* v. *DuPont, supra, Brown Shoe Company* v. *United States,* 370 U.S. 294 at page 335, and *United States* v. *Philadelphia National Bank,* 374 U.S. 321 at page 357. The Court concludes that the relevant market area is as heretofore defined and that such meets the requirements of the cases just cited.

The Court concludes that the percentage share of the market of Continental before and after the acquisition was not sufficient to bring it within the presumption of being anti-competitive as set forth in *United States* v. *Aluminum Company of America,* 377 U.S. 271, *United States* v. *Continental Can Company,* 378 U.S. 441 or *United States* v. *Philadelphia National Bank,* 374 U.S. 321. The Court concludes that this percentage share of the market cannot be determined from the refineries in New Mexico alone. The Court further concludes that the market share of Continental and Malco, combined in the relevant market area did not bring Continental within this anti-competitive category. The Court further concludes that the market share of Continental went down after the acquisition when compared to the total of both companies. The Court further concludes that the distribution of gasoline was continued by a subsidiary company, in competition, just as it had before the acquisition. The Court further concludes that Continental has divested itself of the distribution system which it acquired. The Court further concludes that the United States has not proved any substantial lessening of competition in the past nor any reasonable probability of lessening competition in the future.

In fact, the Court concludes that competition has not been affected at all.

The Court concludes that Albuquerque is not a sub-market any more than any town in New Mexico is a sub-market. There was nothing to distinguish it from other towns except its size and the fact that there is a terminal in Albuquerque on the pipe lines. Its problems are no different than Santa Fe, Roswell, Las Cruces or other cities in New Mexico. It is true that each city may be a sub-market in the sense mentioned in the Brown Shoe case, supra, still if that is to be taken as a fact the Court concludes that the effect of the acquisition did not affect Albuquerque any more than any other place in the relevant market area.

In passing, the Court wishes to say that it has considered post acquisition evidence as well as the other evidence in determining the facts and conclusions in this case. The Court felt this was justified under the ruling in *F.T.C.* v. *Consolidated Foods,* 380 U.S. 592.

The Court concludes that the intent of Continental in acquiring the property in question was not to stifle competition. The Court felt that this could be considered as a factor in the case by virtue of the holdings in *Brown Shoe Company* v. *United States,* 370 U.S. at page 346, and *United States* v. *Philadelphia National Bank,* 374 U.S. at page 371. In that regard the Court concludes that Malco Refineries Incorporated was a marginal operation which was casting about to find a purchaser; that the Continental refinery had a life expectancy of only about two years and that Continental felt that the only practical solution was to combine the two refineries. The Court also concludes that Continental did not acquire the new company for the purpose of increasing its sales or influence as a major company but only to continue the

company acquired in the same way it had been conducted in the past.

From all of the foregoing the Court concludes that the United States has failed to prove the material allegations of its complaint and that the complaint should be dismissed.

An order may be prepared and submitted by the Defendant after approval as to form by the Plaintiff.

H. VBARLE PAYNE,
United States District Judge.

APPENDIX B

United States District Court for the District of New Mexico

Civil No. 4763

UNITED STATES OF AMERICA, PLAINTIFF

v.

CONTINENTAL OIL COMPANY, DEFENDANT

Judgment

This action came on for trial before the Court, Honorable H. Vearle Payne, District Judge, presiding, and the issues having been duly tried on the 13th, 14th, 15th, 16th, 19th, 20th, 21st, 22nd, 23rd and 26th days of July, 1965, and the Court having duly rendered his Decision and Opinion on September 7, 1965,

It is ordered, adjudged and decreed that all relief prayed for by the Plaintiff be and the same hereby is denied and that this action be and the same hereby is dismissed on the merits.

Dated at Albuquerque, New Mexico, this 20th day of September, 1965.

H. VEARLE PAYNE,
District Judge.

Approved as to form:
LAWRENCE W. SOMERVILLE,
Attorney for Plaintiff.

APPENDIX C

STATISTICAL DATA

TABLE 1.—*Total Sales of Gasoline in New Mexico (1958) (including net inter-refiner sales*)*

Rank	Refining Company	Gallons	Percentage of Total Sales
1	Sotex	64, 694, 933	17.09
2	El Paso	48, 735, 206	12.88
3	Malco	47, 717, 766	12.61
4	Texaco	46, 603, 977	12.31
5	Continental	44, 513, 774	11.76
6	Phillips	35, 551, 961	9.66
7	Shamrock	27, 689, 352	7.32
*8	Coseden	11, 592, 317	3.06
9	Famariss	10, 382, 409	2.74
10	Gulf	6, 099, 185	1.61
	Others	33, 914, 353	8.96

*Net inter-refiner sales are sales to other refiners less purchases from other refiners.

**Coseden is an independent refinery located in Texas off the New Mexico pipeline. It ships gasoline to eastern New Mexico by truck. (See p. 6, *supra*.)

Source: GX 68(a).

TABLE 2.—*Total Sales of Gasoline in New Mexico (1958) (excluding inter-refiner sales)*

Rank	Refining Company	Gallons	Percentage of Total Sales
1	Sotex	64, 906, 784	17.15
2	Phillips	41, 214, 497	10.89
3	Texaco	40, 419, 761	10.68
4	Continental	36, 566, 756	9.66
5	El Paso	36, 447, 546	9.63
6	Shamrock	25, 737, 706	6.80
7	Malco	25, 519, 719	6.74
†8	Gulf	17, 976, 430	4.75
†9	Magnolia	17, 573, 990	4.64
10	Coseden	11, 592, 317	3.06
†11	Humble	11, 162, 631	2.95
†12	Sinclair	9, 705, 283	2.56
13	Famariss	8, 535, 782	2.26
14	Four States Western	5, 667, 417	1.50
	Others	25, 468, 726	6.73

†These companies have no refining facilities in New Mexico or on New Mexico pipelines, but they buy most of the gasoline which they sell in New Mexico from one or more of the other companies listed above.

Source: GX 69.

TABLE 3.—*Refineries Located in New Mexico or on New Mexico Pipelines Ranked According to Refining Capacity*

Rank	Refining Company	Capacity (barrels per day)	Percentage Share of Total Capacity
1	Phillips	71,000	31.1
2	Soter	53,000	23.2
3	Texaco	35,000	15.3
4	Shamrock	25,000	10.9
5	El Paso	23,000	10.1
6	Malco	11,500	5.0
7	Continental	4,000	1.8
8	Wickett	2,500	1.1
9	Four States	2,000	0.9
10	Famariss	1,380	0.6

Source: Con X 81.

TABLE 4.—*Sales in New Mexico by Independent Refiners Located in New Mexico or on New Mexico Pipelines (1958)*

Rank	Refining Company	Gallons	Percentage of Sales
1	El Paso	36,447,546	27.6
2	Shamrock	25,737,706	19.5
3	Malco	25,519,719	19.3
4	Cosden	11,592,317	8.8
5	Famariss	8,535,762	6.5
6	Four States Western	5,667,417	4.3
*	Others	18,500,000	14.0

*None of the other independent refiners accounts for more than 4% of all sales by independent refineries.

Source: GX 69.

TABLE 5.—*Refining Capacity of Independent Refiners Located in New Mexico or on New Mexico Pipelines*

Rank	Refining Company	Capacity (barrels per day)	Percentage Share of Total Capacity
1	Shamrock	25,000	38.2
2	El Paso	23,000	35.2
3	Malco	11,500	17.6
4	Wickett	2,500	3.8
5	Four States	2,000	3.1
6	Famariss	1,380	2.1

Source: Con X 81.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

UNITED STATES *v.* CONTINENTAL OIL CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

No. 450. Decided May 29, 1967.

PER CURIAM.

The judgment is vacated and the case remanded to the United States District Court for the District of New Mexico for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U. S. 546.